

Nos. 76-1432, 76-1434 and 76-1435

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In the Supreme Court of the United States

OCTOBER TERM, 1976

STANDARD OIL COMPANY OF CALIFORNIA, PETITIONER

v.

FEDERAL TRADE COMMISSION

MOBIL OIL CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

TEXACO, INC., ET AL., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION

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OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. A-1 to A-168) is not yet reported. The panel opinion of the court of appeals (Pet. App. A-209 to A-259) is reported at 517 F.2d 137. The orders of the district court (Pet. App. A-56 to A-64) are not officially reported but are set forth at 517 F.2d 159-163.

JURISDICTION

The judgments of the court of appeals *en banc* were entered on February 23, 1977. The petitions for a writ of certiorari were filed on April 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether enforcement of investigatory subpoenas issued by the Federal Trade Commission should have been refused or limited on the ground that a formal complaint arising out of the investigation might be met with the defense that an issue had been decided in an earlier proceeding before the Federal Power Commission.

2. Whether the relevance of documents sought by agency subpoenas may be determined by considering whether the documents are reasonably relevant to the formally stated purpose of the agency's investigation.

3. Whether the court of appeals erred in reassessing the relevance of the documents sought and the

burdensomeness of compliance, where the district court's assessment had reflected the application of erroneous legal standards.

STATUTES INVOLVED

The relevant portions of Sections 5(a), 6(a), and 9 of the Federal Trade Commission Act, 38 Stat. 719, 721, 722, as amended, 15 U.S.C. (Supp. V) 45(a), 46(a), and 49, are set forth in the Addendum, *infra*.

STATEMENT

This case arises out of a proceeding pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) 49, to enforce subpoenas for production of documents sought in connection with a nonpublic formal investigation by the Federal Trade Commission. The investigation stemmed from an unprecedented decline, beginning in 1968, in the estimates of proved reserves of natural gas reported by gas producers to the American Gas Association ("AGA") for the important Southern Louisiana area (Pet. App. A-4, A-6).¹ The purpose of the Trade Commission's investigation was not, however, limited to AGA reporting. The Commission's Resolution of June 3, 1971, stated (Pet. App. A-8):

[The purpose of the investigation is] to develop facts relating to the acts and practices of * * *

¹ The decline followed this Court's decision in the *Permian Basin Area Rate Cases*, 390 U.S. 747, which approved the Federal Power Commission's use of estimates of gas reserves in setting rates.

[certain named corporations] to determine whether said corporations, and other persons and corporations, individually or in concert, are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act.

The more limited issue of the accuracy of reporting on natural gas reserves in the Southern Louisiana area previously had been raised in a rate-making proceeding before the Federal Power Commission. See *Area Rate Proceedings, et al. (Southern Louisiana Area)*, 46 F.P.C. 86, affirmed *sub nom. Placid Oil Co. v. Federal Power Commission*, 483 F.2d 880 (C.A. 5), affirmed *sub nom. Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283. All large producers who were parties to that proceeding, including the petitioners in the present case, had been required to answer questionnaires indicating the volumes of uncommitted proved reserves controlled by the producers in the Southern Louisiana area as of year-end 1968 and year-end 1969. 46 F.P.C. at 114. Based upon their responses, the Power Commission staff computed the estimated amount of uncommitted reserves available for sale. The Power Commission concluded that, while there were discrepancies between the figures developed by the Commission's

staff and the AGA reserve data, the two estimates were comparable "on the trends *they* reveal," and that the AGA calculations were "reasonably reliable for the [ratemaking] purposes used herein." 46 F.P.C. at 116, 118 (emphasis in original).² The Power Commission stated: "The evidentiary fact that most concerns us is not in dispute: the traditional trend lines for measuring adequacy of supply * * * are in a declining mode." 46 F.P.C. at 118. The Power Commission accepted a proposed rate settlement on July 16, 1971, noting that "its wide support helps to provide stability to prices in the area and relieve administrative burdens of the Commission, and to reduce the probabilities of future litigation." 46 F.P.C. at 110 (footnote omitted).³

In late 1970, the Trade Commission directed its staff to begin an informal investigation into the activities of natural gas producers in Southern Louisiana. In June 1971, the Commission instituted a formal investigation. The subpoenas were issued in November 1971, calling for various documents re-

² In determining what is a "just and reasonable" rate, the Power Commission is not required to give priority to any particular facts, and may use "any 'formula or combination of formulas' it wishes," so long as the final result "is within a 'zone of reasonableness.'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 797, 800. Although the Power Commission must consider antitrust principles such as those applied by the Trade Commission, it is not bound by them. *Federal Power Commission v. Conway Corp.*, 426 U.S. 271.

³ The Trade Commission was not a party to the Power Commission proceeding, nor was it in privity with any party suggesting any error in the estimates of reserves.

lating to natural gas reserves in the Southern Louisiana area from 1962 to 1970, including petitioners' files on lease bidding, which contain estimates of reserves (Pet. App. A-7 to A-10).⁴ Petitioners refused compliance and, in June 1973, the Commission initiated enforcement proceedings in the United States District Court for the District of Columbia (Pet. App. A-11).

In opposing enforcement, petitioners variously asserted that in light of the existence of the Power Commission ratemaking determination, collateral estoppel barred portions of the Trade Commission's investigation; that some of the documents requested were not reasonably relevant to the investigation; that the scope of the request was unduly burdensome; and that the Trade Commission had not promised adequate safeguards for confidential information (see Texaco Pet. 11; Pet. App. A-19, A-42 to A-44, A-57).

The district court ordered the subpoenas enforced only in a severely truncated form, holding (Pet. App. A-57 to A-58; emphasis in original):

* * * [T]he subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission, and the

⁴ A copy of a typical subpoena served on petitioners is reprinted at Pet. App. A-46 to A-55. The subpoenas seek data the Power Commission had not sought to obtain in its proceeding.

Court being of the further opinion that the subpoenas [is] improper in other respects as well and should not be enforced as issued.

The court ruled that production would be required only of documents containing or underlying estimates of "proved" natural gas reserves (Pet. App. A-58) and not of documents "which contain estimates or evaluations of the volume of natural gas present or recoverable or ultimately recoverable" (Pet. App. A-51). Discovery was limited to the years 1969, 1970, and 1971, and to a random sample of 100 offshore fields.⁵ In addition, the court ordered that the documents obtained relating to "proved" reserve estimates were to be used "for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves" (Pet. App. A-58 to A-59).

The Trade Commission appealed. A panel of the court of appeals substantially affirmed (Pet. App. A-209 to A-257). The court of appeals granted rehearing *en banc*, vacated the panel decision, and reversed the district court's refusal to enforce the subpoenas as issued (Pet. App. A-1 to A-168). Citing the "general rule [that] substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceed-

⁵ The district court also imposed a restrictive protective order as to confidential documents (see p. 9, note 7, *infra*).

ing" (Pet. App. A-32; see *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509), the court held that "collateral estoppel cannot be invoked to limit enforcement of the FTC's subpoenas." The court also ruled that the issue of relevance was to be decided on the basis of the purposes stated by the Commission in its resolution initiating the investigation and that the subpoenas had been impermissibly limited by "speculat[ions] about the possible charges that might be included in a future complaint" (Pet. App. A-22); the court therefore refused to limit the subpoenas only to documents containing or underlying estimates of proved natural gas reserves and held that "the development and reporting of estimates at various stages of the investment and development process is reasonably relevant to the FTC's purpose" (Pet. App. A-25). The court further held that the district court's finding that compliance would be burdensome was "colored in substantial measure by an erroneous concept of the FTC's purpose, and rested at least in part on improper applications of collateral estoppel and relevance" (Pet. App. A-39).⁶

Since the litigation had already substantially delayed the Commission's investigation, the court, citing *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 340-341 (Pet. App. A-39 n. 48), pro-

⁶ The majority also overturned, *inter alia*, the district court's restrictions of the subpoenas to random samples of gas fields and to the years 1969-1971 (see Pet. App. A-37, A-58 to A-60).

ceeded to review the record and concluded that the subpoenas were not unreasonably broad and that compliance with them would not be unduly burdensome (Pet. App. A-37 to A-42).⁷ Two judges dissented.⁸

ARGUMENT

1. The court of appeals correctly held that enforcement of the subpoenas should not be refused merely because a complaint arising out of the investigation might be met with the defense of collateral estoppel.

Petitioners, other than petitioner Standard Oil of California, misconstrue the decision below as holding that principles of collateral estoppel are inapplicable to administrative agencies (see, *e.g.*, *Texaco*

⁷ In addition, the court of appeals overturned the conditions imposed by the district court with respect to confidential portions of the documents (Pet. App. A-42). Acting on a settlement proposal made by the Trade Commission in post-argument negotiations, the court ordered the Commission "not [to] disclose any of the documents produced which the company designates as confidential to any person outside the employ of the FTC * * * without first giving the company ten days' notice of its intention to do so" (Pet. App. A-43 to A-44; footnote omitted). The negotiations had been conducted at the request of the court of appeals when the *en banc* argument indicated that the parties no longer disagreed on certain points concerning the scope of the subpoenas and protective order (Pet. App. A-171 to A-203).

⁸ Judge Wilkey, joined by Judge MacKinnon, filed a dissenting opinion (Pet. App. A-69 to A-164). Judge Leventhal filed a concurring opinion (Pet. App. A-65 to A-67). Judges McGowan, Tamm, and Robb did not participate in the case (see Pet. App. A-208).

Pet. 21-24). In fact, the court of appeals held only that consideration of the question of collateral estoppel was premature in the context of a subpoena enforcement proceeding (Pet. App. A-29 to A-37). As petitioners acknowledge (Texaco Pet. 26 n. 52), the court specifically declined to "reach the merits" of any defense, based upon collateral estoppel, that they might make to a complaint issued by the Trade Commission on the basis of its investigation (Pet. App. A-35 to A-36).⁹ Nothing in the decision bars petitioners from asserting such a defense at the proper time.

The scope of any agency's investigatory subpoena may not be limited by a possible collateral estoppel defense to an ultimate complaint. The role of courts in proceedings to enforce administrative subpoenas is strictly limited. See *Federal Trade Commission v. Crafts*, 355 U.S. 9; *Civil Aeronautics Board v. Hermann*, 353 U.S. 322; *United States v. Morton Salt Co.*, 338 U.S. 632, 652; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 199-201. In particular, potential defenses on the merits, including jurisdictional defenses, may not be asserted as a defense to enforcement of an investigatory subpoena. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501. See also *Oklahoma Press Publishing Co. v. Walling*, *supra*. The courts of appeals consistently have held that de-

⁹ In his concurring opinion, Judge Leventhal states that he would have held that collateral estoppel is inapplicable to rate-making proceedings (Pet. App. A-65 to A-67). Cf. *Tagg Bros. v. United States*, 280 U.S. 420, 425.

fenses that may be raised against an administrative complaint are premature when raised in opposition to a subpoena. See, e.g., *United States v. Empire Gas Corp.*, 547 F.2d 1147, 1151-1152 (T.E.C.A.); *Federal Trade Commission v. Markin*, 532 F.2d 541, 543-544 (C.A. 6); *Federal Trade Commission v. Feldman*, 532 F.2d 1092, 1095-1096 (C.A. 7); *Securities and Exchange Commission v. Howatt*, 525 F.2d 226, 229-230 (C.A. 1); *Federal Maritime Commission v. Port of Seattle*, 521 F.2d 431 (C.A. 9); *Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (C.A. 2), certiorari denied, 415 U.S. 915; *Federal Trade Commission v. Gibson*, 460 F.2d 605, 608 (C.A. 5).¹⁰

These principles are particularly applicable to the doctrines of *res judicata* and collateral estoppel, which "apply only when the subsequent action has been brought." *G. & C. Merriam Co. v. Saalfeld*, 241 U.S. 22, 29; *Brandenfels v. Day*, 316 F.2d 375, 378 (C.A.D.C.), certiorari denied, 375 U.S. 824.¹¹

¹⁰ Petitioners cite cases applying the doctrine of collateral estoppel to administrative agencies (Texaco Pet. 22-23; Standard Oil Pet. 16-17), but in none was the doctrine applied to limit the enforceability of a subpoena.

¹¹ Petitioners incorrectly argue (Texaco Pet. 29) that the earlier proceeding before the Power Commission bars any inquiry into the matter by the Trade Commission. Even if the Power Commission had determined for all purposes that the AGA estimates were accurate, documents relating to the accuracy of those estimates might still be relevant to violations of the Federal Trade Commission Act. For example,

The court of appeals correctly noted (Pet. App. A-34; emphasis in original):

Because a collateral estoppel defense rests on *factual* identities, an enforcing court to evaluate this defense must preview the ultimate complaint. In the instant case, the court must not only foretell the various theories which the FTC's evidence might support and all issues which conceivably might be raised in a FTC proceeding, but also define all issues decided by the FPC. The court then must determine if an issue decided in the first proceeding is identical to an issue to be decided in the second proceeding. Such an exercise is unwise, if not impossible, and is in clear violation of the Supreme Court's admonition in *Oklahoma Press* that an agency's inquiry should not be limited by "forecasts" of the "probable results."

In sum, the court of appeals' decision that the collateral estoppel issue was prematurely raised is consistent with the decisions of this Court and other courts, is correct, and does not warrant review by this Court.¹²

it is possible that an illegal conspiracy to affect the AGA calculations failed of its objective.

¹² Of course, a contrary decision by the court of appeals would have conflicted with the authorities noted in the text; for that reason, the Trade Commission, in seeking *en banc* review, characterized the original panel's decision as one of unusual importance. But the *en banc* decision, which corrected the panel's errors, does not stand for a novel proposi-

2. Petitioners make varied contentions to the effect that the court of appeals erred in its analysis of the potential relevance of the subpoenaed documents.¹³ However, far from "fashion[ing] a new and radically different test of relevancy" (Mobil Pet. 20), the court applied the settled standard announced by this Court in *United States v. Morton Salt Co.*, *supra*, 338 U.S. at 652, *i.e.*, whether the material sought is "reasonably relevant" to an inquiry within the Commission's authority to conduct (Pet. App. A-20 to A-21 n. 23).

Petitioners contend that the formally stated purpose of the Trade Commission's investigation was impermissibly broad (Texaco Pet. 37-38; Standard Oil Pet. 12-13; Mobil Pet. 20). But the Trade Commission has broad powers of investigation, which this Court analogized to those of a grand jury. See *United States v. Morton Salt Co.*, *supra*, 338 U.S. at 642-643. In view of those powers, and the Commission's broad-ranging statutory enforcement responsibilities, the Commission's statement of purpose in its resolu-

tion that warrants review. Petitioner Texaco (Pet. 15-19) fails to appreciate this distinction.

¹³ Petitioners do not seriously challenge the court of appeals' ruling that the subpoenas are not unduly burdensome, except to suggest that the Trade Commission's inquiry unnecessarily duplicated that of the Power Commission. But the present subpoenas call almost entirely for documents that were not sought by or submitted to the Power Commission. In any event, the court of appeals' decision concerning burden turns on the facts of this case and presents no issue warranting this Court's review.

tion commencing the investigation was not unduly broad. See, e.g., *Far East Conference v. Federal Maritime Commission*, 337 F.2d 146, 151 (C.A.D.C.), certiorari denied, 379 U.S. 991.

Petitioners also argue that the court of appeals should not have looked to that purpose in evaluating the relevance of the documents sought but instead should have accepted petitioners' characterization of the Commission's narrower true purpose (Texaco Pet. 35-36; Standard Oil Pet. 12; Mobil Pet. 9-10). We know of no authority for this novel proposition. The court of appeals sufficiently answered it by stating (Pet. App. A-22 to A-23; footnotes omitted):

The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. * * *

* * * The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution. Here, however, the gas producers had posited—and the district court has apparently accepted—an erroneous interpretation of the scope of the FTC's inquiry, and they have then sought to limit the investigation to the confines of this distorted interpretation. There is no merit to the producers' contention that the FTC is only investigating possible underreporting of proved reserves to the AGA. The FTC's resolution does not even mention either the AGA or proved reserves; further, in addition to "conduct in the reporting of

natural gas reserves," the resolution obviously incorporates a broad range of activities "relating to the exploration and development, production, or marketing of natural gas * * *." Although the FTC has never denied that reporting to the AGA is one aspect of its inquiry, it has repeatedly stated that its investigation cannot be so narrowly defined.

Basically, the gas producers would have us believe that all the FTC has in mind is a re-computation of proved reserve estimates submitted to the AGA. On the contrary, the authorized inquiry envisions an examination of all phases of the estimating process.¹⁴ * * *

¹⁴ The court therefore sustained the Commission's effort to secure petitioners' "reserve estimates in connection with bidding on or nominating leases; deciding whether or not to erect permanent platforms; compiling or inventorying total company reserves or supply; negotiating or contracting for the sale of natural gas, or for the joint or common exploration, development, production, purchase, or sale of acreage; obtaining bank loans; or filing depreciation expense schedules with the Internal Revenue Service" (Pet. App. A-23). Petitioner Mobil Oil argues, in connection with its bid files, that a "higher showing of relevance" is applicable when highly sensitive data is subpoenaed (Mobil Pet. 23-25). That claim is without merit. The cases cited by Mobil all involve discovery of sensitive evidence as between private parties or entities in adjudicative proceedings. None involves the rights of the government to obtain evidence needed for law enforcement purposes. The government's right to evidence, sensitive or otherwise, is measured, in this regard, by the "reasonable relevance" test. *United States v. Morton Salt Co.*, *supra*, 338 U.S. at 652; *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S. at 214-218; *Federal Communications Commission v. Schreiber*, 381 U.S. 279, 291.

3. Petitioners contend that the court of appeals improperly set aside the district court's determinations concerning relevance and burden without holding them to be "clearly erroneous" or an "abuse of discretion" (Texaco Pet. 31-43; Standard Oil Pet. 10-14). In fact, the court of appeals explicitly recognized that those were the usual criteria (Pet. App. A-26 n. 29). In reversing the district court's limitations on the scope of the subpoena, however, the court of appeals found that the district court's assessment of relevance and burden had been tainted by its erroneous application of collateral estoppel principles, so that the district court's conclusions as to relevance were "inseparable from * * * its view of the applicable law with respect to the proper scope of the FTC's investigation" (Pet. App. A-25 n. 29). The court of appeals also held that the district court had applied an improper legal standard of relevance (Pet. App. A-21, A-58).

Rather than remand for reconsideration under proper legal standards, the court of appeals determined that in the peculiar circumstances of this case, in which an ordinarily summary proceeding had been long protracted, the public interest would be better served if the court of appeals itself reassessed the issues of relevance and burden under the proper legal standards and on the same record that was before the district court (Pet. App. A-25 n. 29, A-38 to A-39).¹⁵ In doing so, the court of appeals did not

¹⁵ There had been no testimony taken by the district court at any of the hearings, and the case was decided on the basis of affidavits and exhibits.

establish any new principle of appellate review in subpoena enforcement proceedings, and petitioners' contention in this regard does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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ADDENDUM

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719 as amended, 15 U.S.C. (Supp. V) 45(a), provides in pertinent part:

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Section 6(a) of the Federal Trade Commission Act, 38 Stat. 721 as amended, 15 U.S.C. (Supp. V) 46(a) provides:

The [Federal Trade] Commission shall * * * have power—

(a) To gather and compile information, concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

Section 9 of the Federal Trade Commission Act, 38 Stat. 722 as amended, 15 U.S.C. (Supp. V) 49, provides in pertinent part:

* * * [T]he Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.